

Final Order Denying Refund NUMBER: 04-20160488R
Sales Tax
For The 2013 and 2014 Tax Years

NOTICE: IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Final Order Denying Refund.

HOLDING

Under its HVAC maintenance contract, Company offered its customers maintenance and repair services, under which both Company and its customers were aware that the "consumable items will be provided under the contract." Since the price of the items exceeded ten percent of the total price of the maintenance contract, the sales of the maintenance contracts were bundled transactions subject to Indiana sales tax. Because Company sold the maintenance contracts without collecting the sales tax, the sales tax was properly imposed.

ISSUE

I. Sales Tax - Taxable Bundled Transactions - Optional Maintenance Contracts.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-1-11.5; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-4-15; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Miller Brewing Co. v. Indiana Dep't of State Revenue, 903 N.E.2d 64 (Ind. 2009); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); [45 IAC 2.2-2-1](#); [45 IAC 2.2-4-2](#); Sales Tax Information Bulletin 2 (January 2013); Sales Tax Information Bulletin 2 (March 2013).

Taxpayer protests the refund denial of sales tax, which it paid pursuant to an audit assessment.

STATEMENT OF FACTS

Taxpayer is an Indiana company providing plumbing as well as heating, ventilation, and air conditioning (HVAC) services. Taxpayer also offers HVAC maintenance contracts to its customers, both commercial and residential.

The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records for the 2013 and 2014 tax years. Pursuant to the audit, the Department determined that Taxpayer sold various maintenance contracts to its customers - taxable retail transactions - without collecting sales tax. The Department also found that Taxpayer purchased and used various tangible personal property, such as batteries and chargers, during the course of conducting its business without paying sales tax at the time of the purchases or self-assessing use tax later. As a result, in addition to the assessment of additional sales and use tax, the audit assessed penalty and interest.

Taxpayer paid the full amount of the assessments in January 2016 but subsequently filed a GA-110L form, claiming that it was entitled to a refund of the amount it paid. The Department, upon review, denied Taxpayer's refund claim.

Taxpayer protested the refund denial. An administrative phone hearing was held during which Taxpayer's representatives explained the basis of Taxpayer's protest. This Final Order Denying Refund results. Additional facts will be provided as necessary.

I. Sales Tax - Taxable Bundled Transactions - Optional Maintenance Contracts.

DISCUSSION

During the hearing, Taxpayer explained that it did not protest the assessment of use tax; rather, it protested the audit assessment of the sales tax on sales of the HVAC maintenance contracts. Taxpayer stated in a February 26, 2016, letter, in relevant part, as follows:

[Taxpayer] received a tax audit for the years of 2013 [and] 2014. It was noted that we sell maintenance [contracts] that are taxable in accordance with the [Sales Tax Information Bulletin 2]. The [B]ulletin states that Maintenance [Contracts] generally meet the definition of the bundled transactions under [IC 6-2.5-1-11.5](#) and are subject to sales tax.

[Taxpayer] does not include more than 10[percent] of the taxable items. We feel we were [misled] during the audit and was not properly informed of what exactly the [B]ulletin entailed. . . .

Thus, the issue is whether Taxpayer's sales of its HVAC maintenance contracts were subject to Indiana sales tax.

Although Taxpayer technically protested the Department's refund denial, it actually is contesting the audit's assessment of tax on the sales of HVAC maintenance contracts. Thus, as a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012). "Each assessment and each tax year stands alone." *Miller Brewing Co. v. Indiana Dep't of State Revenue*, 903 N.E.2d 64, 69 (Ind. 2009). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). Also, "all statutes are presumptively constitutional." *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579, 587 (Ind. 2014) (citing *UACC Midwest, Inc. v. Indiana Dep't of State Rev.* 629 N.E.2d 1295, 1299 (Ind. Tax Ct. 1994)). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Caterpillar, Inc.*, 15 N.E.3d at 583.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a); [45 IAC 2.2-2-1](#). A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2(a). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). Additionally, "[a] person is a retail merchant making a retail transaction when the person sells tangible personal property as part of a bundled transaction." IC § 6-2.5-4-15(b). IC § 6-2.5-1-11.5, in relevant part further provides:

(b) "Bundled transaction" means a retail sale of two (2) or more products, except real property and services to real property, that are:

- (1) distinct;
- (2) identifiable; and
- (3) sold for one (1) nonitemized price.

...

(d) The term does not include a retail sale that:

- (1) is comprised of:
 - (A) a service that is the true object of the transaction; and
 - (B) tangible personal property that:
 - (i) is essential to the use of the service; and
 - (ii) is provided exclusively in connection with the service;
- (2) includes both taxable and nontaxable products in which:
 - (A) the seller's purchase price; or
 - (B) the sales price;

of the taxable products does not exceed ten percent (10[percent]) of the total purchase price or the total sales price of the bundled products

[45 IAC 2.2-4-2\(a\)](#) further explains, in pertinent part, that:

Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10[percent]) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

A person who acquires tangible person property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). The purchaser in general "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." Id. "The retail merchant shall collect the tax as agent for the state." Id.

When a purchaser claims the purchase "is exempt from the state gross retail and use taxes," the purchaser "may issue an exemption certificate to the seller instead of paying the tax." IC § 6-2.5-8-8(a). The "seller accepting a proper exemption certificate under [IC § 6-2.5-8-8] has no duty to collect or remit the state gross retail or use tax on that purchase." Id. However, the "seller that accepts an incomplete exemption certificate . . . is not relieved of the duty to collect gross retail or use tax on the sale unless the seller obtains . . . a fully completed exemption certificate . . . within ninety (90) days after the sale." IC § 6-2.5-8-8(d). Otherwise, as an agent for the State of Indiana, the seller "holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3.

Taxpayer in this instance asserted that it was entitled to a refund of the sales tax - which was assessed by the Department's audit - on its sales of HVAC maintenance contracts. Taxpayer claimed that "[its] maintenance [contracts] do not include any parts or taxable items, [and] they only include labor . . .," i.e., not bundled transactions. Taxpayer argued that the Department's Sales Tax Information Bulletin 2 (March 2013), 20130327 Ind. Reg. 045130126NRA ("Information Bulletin 2"), was not applicable because it provided maintenance services and the audit should not have assessed the sales tax. To support its protest, Taxpayer provided additional documents, including a list of customers' names, signed maintenance contracts, invoices, and a sample copy of the "Planned Maintenance Checklist."

Upon review, however, the Department is not able to agree that Taxpayer's sales of maintenance and repair contracts were not subject to sales tax. Information Bulletin 2 explains in relevant part, as follows:

II. OPTIONAL MAINTENANCE CONTRACTS

Maintenance contracts generally meet the definition of bundled transactions under IC [§] 6-2.5-1-11.5 and are subject to sales tax on that basis. The determination as to whether a contract is a maintenance contract is not necessarily based on the particular title of or language used in the contract. Instead, the determination is based on the substantive provisions contained in the contract. An explicit guarantee that tangible personal property will be provided under the contract is not required. What is important is that both the customer and the service provider are aware at the time the contract is executed that consumable items will be provided under the contract. However, the amount of tangible personal property supplied under the contract must be more than a de minimis amount. As a rule, the seller's purchase price or **the sales price of the taxable items** provided under the contracts must exceed 10[percent] of the total purchase price or the total sales price of the bundled products.

For purposes of this bulletin, these contracts include the retail sales of two or more distinct and identifiable products for one non-itemized price and include repair labor as well as replacement parts, consumable items, and general services such as cleaning and inspecting that are provided on a periodic basis. These contracts include scenarios in which the specific repair and replacement parts and consumable items needed to maintain the equipment are provided at no additional cost or with a small deductible. For purposes of this bulletin, the term "consumable items" includes items that are depletable, are disposable, are consumable, or need to be replaced after they have been used for a period of time. An example of consumable items can be found where a service provider sells a maintenance contract for a copy machine. Under the contract, parts and consumable items that require regular replacement for the copier to perform its function (such as drums, toner, fuser, developer, etc.) are replaced at no additional cost along with incidental repair parts that may need to be replaced due to unforeseen circumstances.

(Emphasis added). See also Sales Tax Information Bulletin 2 (January 2013), 20130102 Ind. Reg. 045120673NRA.

Taxpayer's maintenance contracts showed that it provided "Value Service Plus" to periodically maintain and repair its customers' HVAC equipment. Taxpayer's "Value Service Plus" included, in relevant part:

[T]o inspect the equipment 2 times a year and on each inspection perform the appropriate services per the following check lists:

. . .
Install gauges and check operating pressures.
Check voltage and amperage to all motors.
. . .
Lubricate all moving parts.
. . .
Clean burners.
. . .
Check filters. Replacements included. . . .

In short, under its HVAC maintenance contract, Taxpayer offered its customers periodic maintenance and repair services, under which both Taxpayer and its customers were aware that "consumable items will be provided under the contract." Since the sales price of the items, including "gauges" and "filters," exceeded ten percent of the total price of the maintenance contract, the sales of the maintenance contracts were bundled transactions and were subject to Indiana sales tax. IC § 6-2.5-4-15(b); IC § 6-2.5-1-11.5(b); [45 IAC 2.2-4-2\(a\)](#); see Sales Tax Information Bulletin 2 (March 2013); Sales Tax Information Bulletin 2 (January 2013). Because Taxpayer sold the maintenance contracts to its customers without collecting the sales tax, Taxpayer remained liable for the tax. As a result, the sales tax was properly imposed and Taxpayer was not entitled to the refund of the sales tax.

FINDING

Taxpayer's protest is denied.

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